legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph c of this article.

g. Weighing evidence.—In the appellate review of records of trials by court-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

h. Finality of court-martial judgments.—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

50 U.S.C. 649 (Article of War 62) 64 Stat. 127

ART. 62. Reconsideration and revision.

a. If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON,

Petitioner,

vs.

JOHN C. TAYLOR, ACTING WARDEN,

Respondent

BRIEF OF PETITIONER

EDWARD R. VAN SUSTEREN,
229 West College Ave.,
Appleton, Wisconsin,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 234 F. 2d 611. The opinion of the District Court is reported at 135 F. Supp. 776.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). The judgment of the Court of Appeals was entered on May 31, 1956. The petition for a writ of certiorari was filed on August 21, 1956.

Statutes and Regulations Involved

50 U.S.C. 653 (Article of War 66) 64 Stat. 128

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or

civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as aprroved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President of the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocate General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically

to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the boards of review.

10 U.S.C. 1522 (Article of War 50½) 41 Stat. 799

ART. 50½. Review: Rehearing.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld

under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentense, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove. In whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the

accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in

part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

10 U.S.C. 1522 (Article of War 50) 62 Stat. 637

ART. 50. Appellate Review.—

a. Board of review; judicial council.—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge

Advocate General's Department of grades below that of general officer.

b. Additional boards of review and judicial councils.—Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

c. Branch offices.—Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer of The Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

d. Action by board of review when approval by president or confirming action is required.—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President of such other confirming authority, as the case

may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient the support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or, confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General

to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

e. Action by board of review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action

b. Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this code; or

(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

50 U.S.C. 650 (Article of War 63) 64 Stat. 127

ART. 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing in which case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon

a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

Questions for Review

1. Where a court martial convicted a soldier on two separate charges, murder and attempted rape, and imposed one lump sentence, life imprisonment, for both charges and the Board of Review set aside the murder conviction for lack of evidence but affirmed the conviction for attempted rape, was the Board of Review thereupon authorized to make its own initial determination of the proper sentence for attempted rape and allot twenty years of the life sentence for that charge (the maximum) or was it required to order a rehearing?

2. Did Article of War 50 (10 U.S.C. 1521) which was in effect at the time the crime was committed, guarantee to a soldier a new trial under the facts and circumstances of this case and, if so, was there a violation of the soldier's rights under Section 9 of Article One of the United States Constitution (ex post facto) in applying Article 66 of the U. S. Code of Military Justice (50 U.S.C. 653) to the appellant procedures of his case where such latter article is interpreted as not guaranteeing a new trial?

Statement of the Case

There is no dispute about any of the material facts of the case. The petitioner, then a soldier in the U. S. Army and stationed in Korea, was brought before a general court martial at Haengsong, Korea, on June 8, 1951, charged with the murder of "an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine." He was also charged with "forcibly and feloniously, against her will, having carnal knowl-

edge of an adult Korean female person whose name is unknown."

Two other soldiers, Carl Andrew De Coster and Harriel L. Fowler, were tried with him, charged in identical manner. At the conclusion of the trial, June 9, 1951, the Court found all three of the defendants guilty of murder and not guilty of rape, but guilty of attempted rape. After the findings of guilty were announced the Law Officer instructed the Court that the penalty on the conviction of murder must be either death or life imprisonment. After deliberating for twenty minutes the court announced a life imprisonment sentence for each of the defendants.

The Law Officer did not at any time instruct the court on the subject of the maximum or minimum sentence for attempted rape nor did the court fix any separate penalty therefor.

In due course the convictions and the sentences of all three soldiers were reviewed by the Board of Review pursuant to Article 66, U.S.C.M.J. That Board, on June 15, 1952, announced its decision as follows:

> "In the absence of adequate proof linking the acts of the accused with the death of the victim of the attempted rape, we conclude that the findings of guilty of murder (Specification 1) are incorrect in law and fact and should be set aside. (MCM, 1949, subpar. 179*a*., p. 232, 'Proof')"

The Board did not order a rehearing for the purpose of imposing sentences on the remaining convictions but instead, reduced the life sentence to the legal maximum for attempted rape. That maximum was twenty (20) years.

On June 2, 1952, the United States Court of Military Appeals declined to consider plaintiff's Petition for Grant of Review. *United States* v. *Fowler, De Coster and Jackson,*

1 USCMA 713. Jackson, your petitioner here, was eventually transported to the U. S. Penitentiary at Lewisburg, Pennsylvania for service of his sentence and he is now confined there.

In March, 1954, petitioner instituted habeas corpus proceedings before the United States District Court for the Middle District of Pennsylvania directed against the Warden of the Penitentiary at Lewisburg. That action was based upon the contention that the Board of Review exceeded is authority when it fixed a twenty year penalty for attempted rape. The writ was denied. *Jackson* v. *Humphrey,* 135 Fed. Supp. (November 25, 1955).

The United States Court of Appeals for the Third Circuit rendered its opinion and judgment on May 31, 1956, affirming the judgment of the District Court 234 F. 2d, 611. Certiorari has been granted for a review of that decision.

Summary of Argument

The Board of Review, being an inferior court of limited jurisdiction, has only those powers given to it by statute.

Article 66 of the Uniform Code of Military Justice (50 U.S.C. 653) is the statute which creates the Board and defines its powers. Authority to make an initial determination of a sentence is not given by express language in that or any other statute even though apt words and phrases could easily have been found to confer such power. Nor does the Code give the Board broad supervisory powers from which such authority might be inferred. The language in its ordinary meaning indicates that Congress intended the Board to have the usual powers of appellate courts in addition to clemency powers, but nothing more.

Two antecedent statutes, in pari materia, dating back to 1920, clearly require the Board to send the record back for

rehearing in cases of this kind and so the rule, that long established principles will not be overturned without express language or unmistakable implication should be applied here. Imposition of sentences by appellate courts is repugnant to American precedents. Neither the House nor the Senate Committee Report implies such authority. Federal courts do not have it. The Lord Mansfield Doctrine as recited by the *Claassen* case does not give such authority except under facts clearly distinguishable from the present case.

An interpretation of Art. 66 which gives the Board power to make an initial, and at the same time final, determination of a sentence is out of harmony with other provisions of the Code and is in opposition to the manifest intention of Congress to establish strong safeguards against unnecessarily harsh penalties. It would eliminate two of the three routine steps in proper sentence procedure which are mandatory for all other cases.

The statute is ambiguous. Unjust and unfair interpretations will never be given to resolve an ambiguity. Where a soldier has been erroneously or wrongfully convicted of murder and sentenced therefor to life imprisonment it is not fair or just that an appellate tribunal upon discovering the error should have authority to set aside only such part of the sentence as exceeds the maximum for some other crime on which he stands convicted. That is especially true where there is nothing to show what sentence a court-martial would have imposed.

The crime was committed prior to the effective date of the statute used to govern the appellate procedures of this case. An interpretation of Art. 66 which denies to petitioner two of the routine steps in sentence procedure and two chances for a lesser sentence which were guaranteed by the law in

effect at the time the offense was committed, is a violation of the ex post facto provision of the U. S. Constitution because the statute, so interpreted, alters the situation of the accused to his disadvantage and affects him in a harsh and arbitrary manner.

ARGUMENT

The Board of Review Is a Court of Special and Limited Jurisdiction and Has Only Such Powers as Are Given to It By the Statute Which Created It.

The Board of Review is a unit or component of the Judge Advocate General's Office. It was created by Article 66 of the Uniform Code of Military Justice (50 U.S.C.A. 653) and its powers and duties are as defined therein. Its rules of procedure are prescribed by Executive Order #10214 promulgated May 5, 1950, pursuant to Article of War 36. The Order establishes procedure for all phases and all steps of military justice and is published in book form with the title, Manual for Courts-Martial. (M.C.M.)

In *Runkle* v. *United States,* 122 U.S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 this Court said that a court martial is:

> "... one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences it must appear affirmatively and unequivocally that ... all the statutory regulations governing its proceedings have been complied with and that its sentence was conformable to law."

It is conceded that, except for ex post facto considerations, Congress has Constitutional authority to grant the Board of Review the power in question, and so the issue is resolved to one of proper interpretation of the statute applicable.

Authority to Make Initial Determination of a Sentence Under the Facts of This Case Cannot Be Found Within the Language Employed.

So much of Art. 66 as is pertinent to this brief is set forth below.

> "(b) The Judge Advocate General shall refer to a Board of Review the record in every case of trial by court martial in which the sentence, as approved, . . . extends to . . . confinement for one year or more."
>
> "(c) In a case referred to it the Board of Review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it shall have authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."
>
> "(d) If the Board of Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed."
>
> "(e) The Judge Advocate General shall, . . . instruct the convening authority to take action in accordance with the decision of the Board of Review. If the Board of Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges."

Before analyzing the language of the statute to determine whether the Board exceeded its powers it is necessary to have in mind the peculiar facts of this case. The court martial convicted petitioner on two separate charges and specifications, murder and attempted rape. Before the Court started its deliberations on the sentence to be imposed, it was advised by the law officer that the sentence had to be either death or life imprisonment. The Court announced one single sentence, life imprisonment. There was no separate sentence for the attempted rape nor was anything said to indicate what part or amount of the sentence was assessed on the conviction for attempted rape. The convictions on both counts, and the sentence, were thereafter approved by the convening authority in routine manner and the record was referred to the Board of Review. The Board found that there was nothing in the record to establish a connection between the actions of the three defendants and the death of the woman and accordingly set aside the murder conviction. It did not, however, set aside the entire sentence and return the record to the convening authority for a rehearing. Instead, it set aside only so much of the sentence as exceeded the maximum for attempted rape—twenty years—and affirmed the sentence as modified..

The true essence of the Board's action is described by the U. S. C. A. for the Seventh Circuit in the case of *DeCoster* v. *Madigan*, 223 F. 2d 906 (a companion case to this one). that Court said: (p. 909)

> "We are unable to discern how this action can fairly be characterized as other than an original imposition of sentence by the Board. The court martial imposed no such sentence, yet after the review of this case plaintiff was confronted with a twenty year term."

If it is contended that the language of the statute expressly conferred the power in question then such language must be found in the following sentence from paragraph c of Art. 66.

> "(c) . . . It (the Board of Review) shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

There is no other language, either in the Uniform Code of Military Justice or in the Executive Order which gives the Board authority to allot a portion of the sentence against any one of the convictions.

The first reaction to the phraseology of that paragraph is that if Congress intended the interpretation given to it by the Board of Review it could easily have found apt words or phrases to express it. This Court has frequently applied that test. *U. S.* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 58 L. ed. 658, 34 S. Ct. 337; *Hiscock* v. *Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 S. Ct. 488; *Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 49 L. ed. 790, 25 S. Ct. 443. How clear and unmistakable would have been the intention of Congress if it had added to the paragraph this sentence: "If it affirms only a part of the findings it shall impose an appropriate sentence for the convictions which have been affirmed." Such language is not there; the only permissible conclusion is that Congress did not intend it to be there.

Nowhere in the Code is there any language in broad form giving the Board the equivalent of supervisory jurisdiction over courts martial. It has no authority to direct a court martial concerning any proceeding except that it may order a rehearing, and even then, the convening authority may dismiss the charges if it finds a rehearing impracticable.

The plain, ordinary meaning of the language used indicates clearly that Congress intended the Board of Review to have those powers ordinarily exercised by all of the appellate courts of the States, and of the United States; i.e. to set aside convictions which are not sustained either by the law or the facts and to set aside sentences or such parts of sentences as may be incorrect in law or in fact. Its authority goes a bit further; it has the authority of a clemency board. It can set aside any part or amount of the sentence which it determines on the basis of the entire record should be set aside. Congressional intent in conferring that clemency power can be determined from the Senate and House Committee reports both of which say, "The Board may set aside on the basis of the record, any part of a sentence; either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the Armed Forces" S. Rep. #486, 81st Cong. 1st Sess. 28 (1949); H.R. Rep. #491, 81st Cong. 1st Sess. 31-32 (1949).

Statutes Will Not Be Construed to Overturn Long Established Rules or Principles Unless an Intent to Do So Plainly Appears by Express Declaration or Necessary or Unmistakable Implication.

The Board of Review was originally created by Art. of War 50½, 41 Stat. 799, 10 U.S.C.A. 1522 enacted June 4, 1920. Concerning the authority of the Board of Review in cases where the findings or the sentence have been vacated in part that statute provided:

> ". . . when . . . the Board of Review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part . . . such findings and sentence shall be vacated in whole or in part in accord with such holding . . . and the record shall

be transmitted . . . to the convening authority for a rehearing or such other action as may be proper . . ."

The Articles of War were amended on June 24, 1948 by public law 759, Ch. 625. Art. 50½ was replaced by Art. 50. So much of Art. 50 as concerns the question at hand reads as follows:

"e (3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence in whole or in part . . . the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted . . . to the convening authority for rehearing or such other action as may be appropriate."

It would be hard to find language which, as applied to the facts of this case, would more clearly and certainly require the Board of Review to return the record for rehearing. The Board found the record of trial legally insufficient to support a part of the findings and of course it followed that the record was also insufficient to support a part of the sentence. The language is mandatory. The findings and the sentence *shall* thereby be vacated in whole or in part in accord with such holding. The statute then says: "And the record shall be transmitted . . ."

It is not reasonable to suppose that Congress intended the radical departure from pre-existing law, claimed by respondents, without clear and specific language in the statute itself to show such a purpose. Not only is such language lacking in the act itself but even the reports of the Armed Services Committees of the Senate and the House failed to make any mention that the new Board of Review had the power to make an initial determination of a sen-

tence. There is nothing in either of those reports that would even imply such a change.

Initial determination of a proper sentence by an appellate court, where there is nothing in the record to show what punishment the trial court intended, is alien and repugnant to American precedents and traditions. The civil courts, State and Federal, have never presumed to have such power. There is no Federal statute to give such a power to the United States Courts and no statute has been found in any State which confers such authority on any State Appellate Court.

Probably respondent will assert the rule announced by this court in the case of *Claassen* v. *United States*, 142 U.S. 140, 12 S. Ct. 169, 35 L. ed. 966 (1891) as precedent or authority for initial sentencing power by appellate courts. The rule has been followed and reaffirmed in the case of *Carter* v. *Mc-Claughry* 183 U.S. 365, 22 S. Ct. 181, 46 L. ed. 236 (1902) and *Evans* v. *United States* 153 U.S. 608, 14 S. Ct. 939, 38 L. ed. 839 (1894) and in *Pinkerton* v. *United States* 328 U.S. 640, 66 S. Ct. 1180, 90 L. ed. 1489 (1946) as well as a number of other cases which it is unnecessary to cite here. That rule is as follows:

> "In criminal cases the general rule as cited by Lord Mansfield before the Declaration of Independence is 'That if there is any one count to support the verdict, it shall stand good notwithstanding all the rest are bad.' (cases cited) And it is settled law in this court and in this Country generally, that in any criminal case, a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error if any one of the counts is good and warrants the judgment, because in the absence of anything in the record to show the contrary the presumption of law is

that the court awarded sentence on the good count only."

Petitioner does not dispute the rule. This Court is not asked to rescind or to modify it. It simply has no application to the facts of this case. Two conditions must be met in order to make the rule operative: (1) The count which has been held good must warrant the sentence imposed and (2) There must be an absence of anything in the record to show the contrary of the presumption. It is undisputed that the count which has been held good (attempted rape) does not warrant or support the sentence of life imprisonment. Furthermore, the record shows clearly that the court awarded sentence not "on the good count only" but on the bad count, murder. The law officer instructed the court only on the subject of maximum and minimum penalties for murder. The court fixed the penalty at life imprisonment which was the legal minimum for the murder count.

No authority, either in the nature of an adjudicated case or the writing of any scholar in military or civilian law, has ever been cited by the respondent in any of the other courts where this case or its companion cases have been argued, to show that the doctrine of the Claassen case has been enlarged to include cases where the sentence was greater than the maximum permissible for the count which has been held good. Indeed, the very language of the doctrine specifically excludes such a case from its application.

The very fact that the Lord Mansfield Doctrine or the Claassen Rule has been cited or used by this court is authority for the proposition that appellate courts do not have authority to allot a portion of the sentence against a count or a conviction which has been held good except where the facts bring the case within the limits of the rule. If appellate courts generally had the authority to apportion part of the sentence to the convictions which have been sustained

without regard for the question of whether the sentence imposed by the trial court was in excess of the maximum for the conviction that has been sustained and without regard for the question of whether there is anything in the record to show that the court in fact intended the sentence to apply against the conviction which has been set aside, then there would be no need to have a rule of law as announced in the Claassen case.

It is significant that the United States Court of Military Appeals in a case where the procedure was controlled by the Uniform Code of Military Justice has found it necessary to invoke the Claassen Rule. *United States* v. *Bobby L. Keith* 1 U.S.C.M.A. 442, 4 C.M.R. 34 (July 3, 1952). In that case the defendant was convicted on several counts or charges each of which, by itself, was sufficient to warrant the entire sentence imposed. The court set aside some of the convictions but did not disturb the sentence. It held that the Claassen Rule was applicable. The significance of the case lies in the fact that the Court of Military Appeals bothered to make an exhaustive analysis of the rule and all of its ramifications because, if that court had been of the opinion that the Board of Review held the plenary power over judgments which the respondent asserts, then it would not have been necessary to apply the rule of the Claassen case. The court would simply have ruled that one of the counts was not good and thereupon would have remanded the case to the Board of Review to exercise its power over the sentence. Since the prior statute did not confer the authority in question and in the absence of any judicial precedent therefor the rule that legislatures will not be presumed to intend to overturn long established legal principles unless such intention is made clearly to appear by express declaration or necessary implication is applicable to the question at hand. 50 Am. Jr. 333 (Statutes sect. 340)

citing *St. Louis and S. F. R. Co.* v. *Delk* (C.C.A. 6th) 158 F. 931, (reversed on other grounds in 220 U.S. 580, 55 L. ed. 590, 31 S. Ct. 617)

In Construing a Statute All of the Various Provisions of It Should Be Read So That All May, If Possible, Have Their Due and Conjoint Affect Without Repugnancy or Inconsistency. Helvering v. Credit Alliance Corporation, 316 U.S. 107, 86 L. ed. 1307, 62 S. Ct. 989.

Does the interpretation demanded by respondent measure up to this rule. We have seen that if the Board, upon setting aside a conviction on a major charge has the power to fix a penalty on the remaining minor charges it might well be that such a penalty is in excess of that which the court martial might have fixed. Such a result is repugnant to other provisions of the statute as follow:

(a) The first sentence of Art. 66 c. provides that:

"(c) In a case referred to it the Board of Review shall act only with respect to the findings and sentence as approved by the convening authority."

(b) Art. 63 provides that on rehearing no sentence, "In excess of or more severe than the original sentence shall be imposed."

(c) Art. 62 says that no record may be returned, "For the purpose of increasing the severity of a sentence of a court martial unless the sentence prescribed for the offense is mandatory."

Consideration of the Code as a whole discloses the clear intent of Congress to give a soldier every possible protection against unnecessarily severe sentences. Upon conviction for any major offense a soldier has three more or less automatic reviews open to him and at each stage the reviewing authority may set aside findings of guilt or may

reduce the sentence but findings of not guilty may not be reinstated nor may any sentence be increased. Certainly such provisions are not consonant with or harmonious to an interpretation that the Board of Review should make an initial determination of a penalty, which is at the same time a final determination, thereby foreclosing the soldier of his two chances for a less severe penalty—the court martial itself and the convening authority.

It Is Considered a Reasonable and Safe Rule of Construction to Resolve Any Ambiguity in a Statute in Favor of a Just or Fair Interpretation Thereof. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 52 L. ed. 1061, 28 S. Ct. 616; Carey v. Donohue, 240 U. S. 430, 60 L. ed. 726, 36 S. Ct. 386.

That there is ambiguity in the statute is conclusively shown by the fact that two Courts of Appeals have interpreted it in opposite ways. The Court for the Seventh Circuit said: "This action of imposing sentence was beyond the Board's authority because the statute grants it no such power" and the Court for the Third Circuit said: "Such reasonable reading and administration of the legislatively approved Code should not be disturbed by the civil courts."

The unjust or unfair effect of an interpretation of Art. 66 as urged by respondent, can readily be seen in this case. Congress clearly intended that a convicted soldier would initially be sentenced by the court martial and that thereafter he would have two more or less automatic chances for sentence reduction. Both the convening authority and the Board of Review have clemency powers.

In this case the soldier was given the maximum sentence for the crime of attempted rape. The court martial and the convening authority were prevented from exercising any

discretion over the proper sentence for that crime by reason of the minimum penalty for murder. While they were of the opinion that the murder conviction should stand nothing could be done to the sentence. The situation in which petitioner finds himself is not unique. It arises every time the Board sets aside a conviction for a major crime and sustains the conviction on a minor one.

It will be argued that the Board operating under the provisions of Art. 66 has actually saved petitioner from life imprisonment and that he has not been subjected to the whim of the prosecutor and that he has been given the benefit of full appellate procedure prescribed by Congress. If the action of the Board in setting aside the murder conviction was in the nature of clemency then that argument would be valid. However, in this case the Board determined that there was no evidence in the record to show that the actions of the defendants were in any way responsible for the death of the woman. The actions of the Board were therefore not in any way related to the function of clemency. In analyzing the impact on petitioner of the Board's conception of its powers we must be careful to remember that we are dealing with the case of a soldier who has been found innocent of the crime of murder. The Board's action relates back to the time of the trial itself and it cancels the finding of guilty. Petitioner is just as free of the guilt of murder as he would be if it were discovered that the victim of his improper advances was still living and that the dead body found the next morning was that of some other woman. In the light of the hypothetical situation just recited, it is easy to see in sharp focus first of all that the Board did not extend any clemency and secondly that its failure to order a hearing deprived petitioner of a substantial advantage which Congress intended. Art. 66 should not be interpreted to permit the safeguards which Congress gave, to depend

upon the personality or the ambition of the prosecuting officer. Of course if Congress had specifically given the Board of Review the powers as exercised then petitioner could make no legal complaint but the courts will be slow to interpret an ambiguous statute in a manner which appears to have such unjust or unfair results.

The Application of Art. 66 to This Case Is a Violation of the Ex Post Facto Prohibition of the U. S. Constitution If That Article Does Not Give the Accused the Right to a Rehearing.

The alleged offense occurred on March 16, 1951. At that time Article of War 50 was in effect and it governed review of cases of this kind. That article was explicit and mandatory. The pertinent part of it reads as follows:

> "(3) When the Board of Review is of the opinion that the record . . . is legally insufficient to support the findings of guilty or sentence, . . . such findings and sentence shall thereby be vacated in accordance with such holding and the record shall be transmitted . . . to the appropriate convening authority for a rehearing or such other action as may be proper."

It will be borne in mind that the review proceeding both before the convening authority and the Board were an integral part of the court martial process established by Congress. Review was not only a matter of right; it was automatic. Sentencing procedure consisted of three separate steps. No valid sentence existed until all three were completed.

The accused was taken into custody on March 17, 1951, the day after the alleged offense occurred. On May 31, 1951, the Uniform Code of Military Justice became effec-

tive. Trial before the court martial was started on June 8, 1951.

It is quite clear that if the Board of Review had governed itself in accordance with the provisions of Art. 50 petitioner would have been given a rehearing. Such a rehearing would have been before an entirely new court—none of the members of the old court would sit on the rehearing.

At such a rehearing there would be a substantial possibility that the defendant in view of his age and prior good record and taking into consideration the fact that he had been drinking, would receive a lighter sentence than the maximum. The Manual for Courts-Martial says: (p. 121 and 122)

> "... normally the maximum punishment will be reserved for an offense which is aggravated by the circumstances or after conviction of which there is received by the court evidence of previous convictions of similar or greater gravity. In the exercise of its discretion in adjudging a sentence, the court should consider evidence contained in the record respecting the character of the accused as given in former discharges, the number and character of previous convictions . . . and the circumstances extenuating or aggravating the offense. (4) . . . courts will, however, exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority."

If the court martial fixed the maximum punishment, twenty years, the defendant would still have two chances for reduction of sentence; the convening authority and the Board of Review.

This Court said in the case of *Re Medley* 134 U.S. 160, 33 l. ed. 835, 10 S. Ct. 384.

". . . it may be said that any law which was passed after the commission of the offense for which the party is being tried, is an ex post factor law, . . . (if it) alters the situation of the accused to his disadvantage, and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased.

The case of *Kring* v. *Missouri* 107 U.S. 211, 26 L. ed. 506, 2 S. Ct. 443 is in point. Kring was charged with murder. At the time the act was committed, Missouri law provided that if any person plead guilty to second degree murder and the plea is accepted by the court he could not later be tried for first degree murder. Before Kring went to trial the Constitution of the State of Missouri was changed so as to permit prosecution for first degree murder even after acceptance of the plea of guilty to second degree murder. At his trial, Kring plead guilty to second degree murder and was sentenced to twenty-five years. He appealed to the Supreme Court of the State of Missouri on the claim of an agreement between the prosecuting attorney and his attorney that the sentence would not be more than ten years. The Supreme Court of Missouri set aside the conviction and Kring was given a new trial. On the new trial he was charged with first degree murder and was convicted and sentenced to hang. Kring sought a writ of habeas corpus. This Court said:

"We have here a distinct admission that, by the law of Missouri as it stood at the time of the homocide in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not again be tried for

murder of the first degree; and that, but for the change in the Constitution of the State of Missouri, such would be the law applicable in this case. When the attention of the Court (Missouri State Supreme Court) is called to the proposition that if such effect is given to the change in the Constitution, it would, in this case, be liable to objection as an ex post facto law, the only answer is that there is nothing in it as the change is simply in a matter of procedure.

Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied.''.

The Court further said, quoting from *U. S.* v. *Hall*, 2 Wash. (C.C.) 366:

> ''Accordingly, in a subsequent case tried before Mr. Justice Washington, he said . . . 'That an ex post facto law is one, which in its operation, makes that criminal which was not so at the time the action was performed or which increases the punishment, or in short, which, in relation to the offense or its consequences alters the situation of a party to his disadvantage.' ''

It must be recognized that, in general, changes which affect only the procedure for trial or prior to trial are not prohibited by the ex post facto clause. A number of examples of such changes are listed in 11 Am. Jur. 1185 (Constitutional Law, Sec. 357). However, in that same section the writer says:

> ''There may however be procedural changes which operate to deny the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh

and arbitrary manner as to fall within the Constitutional prohibition.''

Most of the provisions of the Uniform Code of Military Justice guarantee greater rights and more protection to an accused person than he formerly enjoyed. At least it cannot be seen how any of them could "affect an accused in such a harsh and arbitrary manner as to fall within the Constitutional prohibition." That is true so far as Art. 66 is concerned, if that Article is to be interpreted so as to give to the accused the three chances which he had under the law as it existed at the time the alleged offense was committed.

On the other hand, if Article 66 is to be interpreted as urged by the Government it would seem quite clear that its application to the appellate procedures of this case would amount to a violation of the ex post facto clause. Changing sentence procedure so that a simple majority of the Board, (two out of three) can effectively impose a final sentence where formerly a sentence of this kind required a three-fourths vote of the court martial plus approval of the convening authority, is not a limited or unsubstantial matter and it comes within the rule of "changes which affect the accused in such a harsh and arbitrary manner as to fall within the Constitutional prohibition."

Conclusion

For the reasons stated the action of the Board of Review was beyond its authority and was therefore void. Petitioner is imprisoned without a valid legal sentence and therefore the writ should issue and petitioner should be discharged.

Respectfully submitted,

EDWARD R. VAN SUSTEREN,
Counsel for Petitioner.